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United States

1572

**Circuit Court of Appeals**

**For the Ninth Circuit.**

TATSUUMA KISEN KABUSHIKI KAISHA, a  
Corporation of the Empire of Japan, Claim-  
ant of the Steamship "HAKUTATSU  
MARU," Her Engines, Apparel, etc.,  
Appellant,

vs.

ROBERT DOLLAR COMPANY, a Corporation,  
Appellee.

**Apostles on Appeal.**

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON.

**FILED**

**DEC 4 - 1928**

**PAUL P. O'BRIEN,**  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS  
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Messrs. COSGROVE & TERHUNE, 2002 L. C.  
Smith Building, Seattle, Washington,

Messrs. McCAMANT & THOMPSON, American  
Bank Building, Portland, Oregon,  
Proctors for Appellant.

Mr. JOHN AMBLER, Pacific Steamship Com-  
pany Terminal, 1519 Railroad Avenue, So.,  
Seattle, Washington.

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In the District Court of the United States for the  
District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,  
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Ap-  
parel, etc.,

Respondent.

CAPTION PURSUANT TO ADMIRALTY  
RULE 4 OF CIRCUIT COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT.

This suit was begun by the Robert Dollar Com-  
pany, a corporation, libellant, against the SS.  
"Hakutatsu Maru," her engines, apparel, etc., the  
libel being filed in the above-entitled court. The

vessel was seized under a writ of attachment, and Tatsuuma Kisen Kabushiki Kaisha, as owner of the vessel, appeared in said cause, filed its claim and release bond, whereupon said vessel was released. No further change of parties has taken place, and no defendant was attached or arrested, bail taken or property attached or arrested except as hereinbefore stated; there was no reference to a commissioner.

The trial court, the Hon. John H. McNary, sustained the exceptions to claimant's amended answer to libelant's amended libel, and claimant refusing to plead further, a decree was entered in favor of libellant against claimant.

Pleadings were filed as follows:

Oct. 28, 1927. Libel (with stipulation for costs) filed and writ of attachment issued.

Oct. 31, 1927. Claim, stipulation for costs and release bond filed.

Jan. 5, 1928. Claimant's answer filed.

Jan. 10, 1928. Exceptions to claimant's answer filed.

Feb. 6, 1928. Opinion of Court upon exceptions to claimant's answer filed, and order allowing exceptions entered. [1\*]

Jan. 15, 1928. Amended libel filed.

Feb. 15, 1928. Claimant's amended answer to amended libel filed.

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\*Page-number appearing at the foot of page of original certified Apostles on Appeal.



April 12, 1928. Exceptions to amended answer filed.

June 4, 1928. Opinion of Court upon exceptions to claimant's amended answer filed, and order entered allowing exceptions.

Aug. 25, 1928. Declaration to further plead filed.

Sept. 18, 1928. Final decree filed.

Oct. 22, 1928. Notice of appeal filed.

Oct. 22, 1928. Appeal bond, approved by appellee, filed.

Oct. 22, 1928. Notice (showing service on appellee) of filing appeal bond filed.

Oct. 22, 1928. Assignment of errors filed.

Oct. 22, 1928. Praecipe for apostles on appeal filed. [2]



United States District Court for the District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,  
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Appare,  
parel, etc.,

Respondent.

## LIBEL.

To the District Court of the United States for the  
District of Oregon:

The libel of the Robert Dollar Company against the Japanese steamship or vessel called the "Hakutatsu Maru," her tackle, apparel and furniture, and against all persons intervening for their interests therein, in a cause of contract, civil and maritime, alleges as follows:

## I.

That libellant is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, in said state. That the SS. "Hakutatsu Maru" is a Japanese vessel, and is now within the port of Portland, Oregon, and within the jurisdiction of this Honorable Court.

## II.

That on or about the 27th day of May, 1925, libellant delivered on board the SS. "Hakutatsu Maru," then lying in the port of Vancouver, British Columbia, and bound for the port of Hong Kong, China, 9,861 pieces of lumber, containing some 328,765 feet board measure, more or less, for transportation to the said port; that the said vessel duly accepted the said lumber and demanded for said transportation a certain freight rate, which libellant duly paid. [3]

III.

That the said shipment of lumber arrived in the port of Hong Kong on or about the 13th day of September, 1925; that libellant promptly demanded delivery of said lumber, but that said vessel refused to deliver same until libellant had paid an additional sum of \$1,580.68; that libellant, finding that delivery of the lumber could only be effected by payment of the said amount, and being in immediate need of said lumber, paid the said amount under written protest on or about the 17th day of September, 1925.

IV.

That the said vessel has refused and still refuses to reimburse libellant for the amount thus wrongfully collected, and libellant is informed and believes that the said vessel is about to leave this port and the United States, so that libellant will be without remedy unless by proceedings against said vessel, her tackle, apparel and furniture.

V.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

NOW, THEREFORE, libellant prays that process in due form of law according to the course of this court in cases of admiralty and maritime jurisdiction may issue against said vessel, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Court would be pleased to de-

creed the payment of the amount hereinbefore set forth, with interest and costs, and that the said vessel, her tackle, apparel and furniture, may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the [4] premises as in law and justice it may be entitled to receive.

JOHN AMBLER,  
Proctor for Libellant,  
1519 Railroad Ave. So., Seattle, Washington.

State of Oregon,  
County of Multnomah,—ss.

John Ambler, being duly sworn, on oath deposes and says, that the Robert Dollar Company is a California corporation, and is not engaged in business in the State of Oregon. That he is the true and lawful attorney for the said Robert Dollar Company; that he is familiar with the facts set forth in the foregoing libel, and the same are true as he verily believes. That he makes this verification for and on behalf of the Robert Dollar Company, being duly authorized so to do.

JOHN AMBLER.

Subscribed and sworn to before me this 28th day of October, 1927.

[Seal] FRANK L. BUCK,  
Notary Public in and for the State of Oregon, Residing at Portland.

My commission expires October 21, 1928.

Filed October 28, 1927. [5]

[Title of Court and Cause.]

STIPULATION FOR RELEASE OF VESSEL.

WHEREAS, a libel has been filed in this Honorable Court by Robert Dollar Company, a corporation, against the steamship "Hakutatsu Maru," her engines, apparel, etc., for the reasons and causes in said libel mentioned, and

WHEREAS, a claim to the said vessel has been filed by Katsuuma Kisen Kaisha, a corporation organized under the laws of the Empire of Japan, the owner of said vessel, and the amount of recovery sought in said libel is the sum of One Thousand Five Hundred Eighty and 68/100 (\$1,580.68) Dollars, together with interests and costs, and

WHEREAS, the vessel has been arrested under process issued in the above-entitled cause and her release from arrest is now desired by the aforesaid claimant,

NOW, THEREFORE, the condition of this stipulation is such that if the claimant herein and Standard Accident Insurance Company, a corporation organized and subsisting under the laws of the State of Michigan, shall abide by all the orders of the court, interlocutory or final, and shall pay the sum of One Thousand Five Hundred Eighty and 68/100 (\$1,580.68) Dollars [6] or so much thereof as may be awarded by this court or by any appellate court if an appeal intervene, with interest, and shall also pay all costs and expenses and disbursements which may be awarded in favor of

libelant herein, then this stipulation shall be void;  
otherwise to remain in full force and virtue,

KATSUUMA KISEN KAISHA,  
By McCAMANT & THOMPSON,

Its Proctors.

STANDARD ACCIDENT INSURANCE  
COMPANY,

Surety.

By A. D. TRUNKEY,  
Attorney-in-fact.

By A. D. TRUNKEY,  
Resident Agent.

[Seal of Surety Company.]

Approved Oct. 31, 1927.

R. S. BEAN,  
Judge.

Filed November 1, 1927. [7]

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[Title of Court and Cause.]

CLAIM.

And now before this Honorable Court appears Katsuuma Kisen Kaisha, a corporation organized and subsisting under the laws of the Empire of Japan, by Ralph H. King, its proctor, and claims the above-named ship and prays to defend this suit accordingly.

COSGROVE & TERHUNE,  
McCAMANT & THOMPSON,  
RALPH H. KING,

Proctors for Claimant.

District of Oregon,—ss.

I, Ralph H. King, being duly sworn, depose and say that I am informed and aver the fact to be that Katsuuma Kisen Kaisha, a corporation organized and subsisting under the laws of the Empire of Japan, is the true and *bona fide* owner of the said steamship "Hakutascu Maru," against which the above suit has been commenced by Robert Dollar Company, a corporation, libelant; that for the purposes of making the above claim I am the agent of the aforesaid claimant and am duly authorized by it and on behalf of the said owner of said vessel to put in this claim. I [8] further say that at the commencement of this suit the above-named vessel was in the possession of Katsuuma Kisen Kaisha as one of its owners.

RALPH H. KING.

Subscribed and sworn to before me this 31st day of October, 1927.

[Seal]

BORDEN WOOD,  
Notary Public for Oregon.

My commission expires November 15, 1930.

Filed October 31, 1927.

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[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND  
INCLUDING JANUARY 5, 1928, FOR  
PLEADING, ETC.

Come now the above-named libelant, respondent

and claimant herein, and stipulate and agree as follows:

Notwithstanding the return date fixed in the attachment herein, the said respondent and claimant may have until January 5th, 1928, in which to further plead herein. [9]

It is further stipulated by and between the parties hereto that the vessel seized herein was the "Hakutatsu Maru" and the true claimant thereof Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan. The stipulation for the release of the vessel, the release bond and the claim therefor shall be deemed amended to show the true names of the vessel and the claimant as herein recited.

Dated this 14th day of November, 1927.

JOHN AMBLER,

Proctor for Libelant.

COSGROVE & TERHUNE,

McCAMANT & THOMPSON,

Proctors for Respondent and Claimant.

Filed November 18, 1927.



In the District Court of the United States for the  
District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,  
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Ap-  
parel, etc.,

Respondent.

AMENDED LIBEL.

To the District Court of the United States for the  
District of Oregon:

The libel of the Robert Dollar Company against  
the Japanese steamship or vessel called the  
"Hakutatsu Maru," her tackle, apparel and fur-  
niture, and against all persons intervening for  
[10] their interests therein, in the cause of con-  
tract, civil and maritime, alleges as follows:

I.

That libellant is a corporation, organized and ex-  
isting under and by virtue of the laws of the State  
of California, with its principal place of business  
in the City and County of San Francisco, in said  
state. That the SS. "Hakutatsu Maru" is a Japa-  
neses vessel, and is now within the port of Portland,  
Oregon, and within the jurisdiction of this Honor-  
able Court.

## II.

That on or about the 27th day of May, 1925, libellant delivered on board the SS. "Hakutatsu Maru," then lying in the port of Vancouver, British Columbia, and bound for the port of Hong Kong, China, 9,861 pieces of lumber, containing some 328,765 feet board measure, more or less, for transportation to the said port; that the said vessel duly accepted the said lumber and demanded for said transportation a certain freight rate, which libellant duly paid.

## III.

That the said shipment of lumber arrived in the port of Hong Kong on or about the 13th day of September, 1925; that libellant promptly demanded delivery of said lumber, but that said vessel refused to deliver same until libellant had paid an additional sum of \$1,580.68; that libellant, finding that delivery of the lumber could only be effected by payment of the said amount, and being in immediate need of said lumber, paid the said amount under written protest on or about the 17th day of September, 1925.

## IV.

That the said vessel has refused and still refuses to reimburse libellant for the amount thus wrongfully collected, and [11] libellant is informed and believes that the said vessel is about to leave this port and the United States, so that libellant will be without remedy unless by proceedings against said vessel, her tackle, apparel and furniture.

V.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

NOW, THEREFORE, libellant prays that process in due form of law according to the course of this court in cases of admiralty and maritime jurisdiction may issue against said vessel, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this court would be pleased to decree the payment of the amount herinbefore set forth, with interests and costs, and that the said vessel, her tackle, apparel and furniture, may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

JOHN AMBLER,  
Proctor for Libellant,  
1519 Railroad Avenue South,  
Seattle, Washington.

State of Washington, .  
County of King,—ss.

John Ambler, being duly sworn, on oath deposes and says: That he is proctor for the Robert Dollar Company, libellant herein; that he has read the foregoing libel, knows the contents thereof, and that the same is true as he verily believes, the facts stated therein having been furnished to him by conversations had with, and documents received from, agents of the said [12] libellant. The rea-

son why this verification is not made by libellant is that it is a corporation of the State of California, with none of its officers in the State of Oregon.

JOHN AMBLER.

Subscribed and sworn to before me this 14th day of January, 1928.

[Seal] CARL STROUT,  
Notary Public in and for the State of Washington,  
Residing in Seattle.

My commission expires Sept. 2, 1928.

Filed January 16, 1928.

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[Title of Court and Cause.]

CLAIMANT'S AMENDED ANSWER.

To the Honorable Judge of the Above-entitled Court:

The amended answer of Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, claimant herein, to the [13] libel herein of Robert Dollar Company, libellant above named, respectfully shows:

I.

Answering Article I of said libel, claimant admits that the vessel "Hakutatsu Maru" is a Japanese vessel, and was, on the 28th day of October, 1927, within the jurisdiction of the above-entitled court; and claimant, lacking information or belief, denies each and every other allegation therein contained.

II.

Answering Article II of said libel, claimant admits each and every allegation therein contained, but alleges that said transportation was made pursuant to contract between libellant and claimant evidenced by a bill of lading, hereinafter more particularly referred to.

III.

Answering Article III of said libel, claimant admits that said shipment of lumber arrived at the Port of Hongkong on the vessel "Somedono Maru" (owned and operated by said claimant) on or about the 13th day of September, 1925; it admits further that libellant promptly demanded delivery of said lumber, but that said vessel "Somedono Maru" and said claimant refused to deliver the same until libellant had paid an additional sum of \$1,580.68; it further admits that libellant paid said sum of \$1,580.68 to the said claimant under written protest on or about the 17th day of September, 1925; that libellant denies each and every other allegation in said article contained.

IV.

Answering Article IV of said libel, claimant admits that said vessel has refused and still refuses to reimburse libellant for said \$1,580.68, and admits that on the 28th day of October, 1927, said vessel was about to leave the Port of Portland, [14] Oregon, and the United States; and claimant denies each and every other allegation in said article contained.

## V.

Answering Article V of said libel, the said claimant denies each and every allegation therein contained.

For a first affirmative defense, said claimant alleges:

## I.

That if libellant's libel states a cause of action, it is not one cognizable in admiralty.

For a second affirmative defense, said claimant alleges:

## I.

That the goods mentioned in said libel were shipped from Vancouver, B. C., in 1925, on said vessel "Hakutatsu Maru" for delivery at Hongkong, China, pursuant to an agreement between the said libellant and the said claimant, through its agents, Walker-Ross, Inc., as evidenced by a bill of lading dated May 27, 1925, issued by said claimant through its said agents (and accepted by said libellant), in favor of said libellant, providing for the carriage of said goods from said Vancouver, B. C., to Hongkong, China, all according to the terms and conditions particularly set forth in said bill of lading; that said agreement of transportation, as evidenced by said bill of lading, provided, among other things, the following:

"8. If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the

same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged, then first; all merchandise not discharged may be retained on board vessel [15] and returned to her port of original shipment or same may be at option of ship's master or agent and at owners cost and risk be conveyed upon such or any vessel to any other port and thence to said port of delivery; or second, same may be forwarded to and landed and delivered or stored at any other port at owner's cost and risk and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchandise or any thereof be so returned to such port of original shipment no additional freight shall be charged, and that delivery or storage of such merchandise at any such other port or on such return to such port of original shipment shall be a final and sufficient delivery. In case any part of the merchandise cannot be found for delivery during vessel's stay at port of discharge, same may be forwarded at Carrier's expense, but no liability shall exist for any loss or damage resulting from delay."

## II.

That said vessel "Hakutatsu Maru," shortly after May 27, 1925, sailed for Hongkong, China, and

while on said voyage, arrived at the port of Kobe, Japan, on the 29th day of June, 1925.

### III.

That at the time said vessel arrived at Kobe and for some time prior thereto, a general strike existed in all Chinese ports, including the port of Hongkong; that in each of said ports said strike was of unusual violence and particularly directed towards British and Japanese vessels; that British and Japanese vessels arriving at said Chinese ports, including the said port of Hongkong, were unable to discharge their cargoes; that at said times there was in said ports, including Hongkong, much rioting, civil war chaos; that Kobe was on the usual and customary route of said vessel on the voyage from Vancouver, B. C., to Hongkong; that said Chinese ports, on account of said strikes, riots, civil war and chaos, being in effect closed, the said port of Kobe, upon the arrival of said vessel, was the only remaining near and safe port on said customary route [16] of said vessel at which the said vessel might land and store the said goods of said libellant.

That the ports of Shanghai and Kelung, Formosa, were somewhat nearer to the port of Hongkong than the port of Kobe, but said vessel would have had to widely deviate from her usual and customary route in order to reach said ports, and further, the charges for discharge, storage and loading of said cargo at each of said ports was many times more than the charges for the same service at Kobe; and therefore the said ports of Shanghai



and Kelung were not either at or near the said port of Hongkong.

That said general strike, rioting, warfare and chaos continued as stated above from June 29, 1925, to September 13, 1925.

#### IV.

That upon the arrival of said vessel at the port of Kobe, the master thereof made due inquiry and was informed of the facts set forth in the preceding article; and because of said information it was his judgment and the judgment of the agents of said vessel that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of said goods or any part thereof; that in their judgment it was likewise unsafe and impracticable to proceed to any other Chinese port and there make said delivery of said goods, or any part thereof; that there was no port available, safe and nearer to Hongkong for the discharge and storage of said goods than Kobe; that by reason of the foregoing the said vessel "Hakutatsu Maru" retained the goods mentioned in said libel on board at Kobe, Japan, until July 21, 1925, at which time said goods were discharged from said vessel and placed in warehouse and/or lumber pool and kept there until August 31, 1925, at which time said goods were taken from said warehouse and/or lumber pool and [17] placed aboard the vessel "Somedono Maru" for shipment to Hongkong, China; that said last-mentioned vessel proceeded, arriving at the port of Hongkong, China, on the

13th of September, 1925, and there delivery of said goods was made to the said libellant without any charge whatever for the carriage of said goods on the said vessel "Somedono Maru"; that the said goods were retained and stored in the port of Kobe as hereinbefore stated because of the above-mentioned reasons, and none other.

#### V.

By reason of the foregoing, said vessel "Hakutatsu Maru" and claimant were obliged to and did pay for the discharge, lighterage, storage and reloading of said cargo at the port of Kobe, the sum of 3,870.50 yen, or \$1,580.68, which was the reasonable and necessary cost thereof.

#### VI.

That the said vessel "Hakutatsu Maru" and her owner, the claimant herein, upon paying said costs and expenses of discharge, lighterage, storage and reloading of said goods, acquired under said bill of lading a lien against said goods in the amount of said payments so made, and upon the arrival of said goods at Hongkong, China, the said "Somedono Maru" and the said claimant refused to deliver the same until they were reimbursed for said payments; that the payment which the said libellant made at Hongkong, and particularly referred to in Article III of its libel, was by way of reimbursement to said "Hakutatsu Maru" and her owners for said costs and expenses so paid by them, and in satisfaction of said lien against said goods, and not otherwise.

VII.

That neither the said vessel "Hakutatsu Maru" nor her owners, the said claimant, are indebted to the said libellant by [18] reason of said payment mentioned in said libel in the sum of \$1,580.68, or in any sum at all.

VIII.

That at all the times herein mentioned, the said claimant, Tatsuuma Kisen Kabushiki Kaisha, was and now is a corporation of the Empire of Japan, and the owner and operator of said vessels "Hakutatsu Maru" and "Somedono Maru."

IX.

All and singular the premises are true.

WHEREFORE, claimant prays that said libel be dismissed with costs, and for such other and further relief as may seem agreeable to the Court.

COSGROVE & TERHUNE,

McCAMANT & THOMPSON,

Proctors for Claimant.

State of Washington,

County of King,—ss.

Howard G. Cosgrove, being first duly sworn, on oath deposes and says: I am one of the proctors for Tatsuuma Kisen Kabushiki Kaisha, claimant herein; I have read the foregoing amended answer, know the contents thereof, and that the same is true to the best of my knowledge, information and belief; the sources of my knowledge or information are communications received from the claimant and its agents and an examination of

the papers relating to the matter in suit. The reason why this verification is not made by said claimant is that it is a corporation of Japan, with none of its officers in either the States of Oregon or Washington.

HOWARD G. COSGROVE.

Subscribed and sworn to before me this 14th day of February, 1928.

[Seal]                      ROBERT S. TERHUNE,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed February 15, 1928. [19]

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[Title of Court and Cause.]

EXCEPTIONS TO CLAIMANT'S AMENDED  
ANSWER.

The libelant above named hereby excepts to the amended answer of *Tatsuuma Kisen Kabushiki Kaisha*, claimant herein, upon the following grounds:

I.

Paragraph 8 of the bill of lading, quoted in claimant's so-called second affirmative defense, is inapplicable to the facts set forth in paragraphs 2, 3, 4, 5, and 6 of its said second affirmative defense, in that paragraph 8 of the said bill of lading contemplated that the SS. "Hakutatsu Maru" would actually proceed to the port of delivery. Said paragraph 8 of the said bill of lading cannot

be invoked by said vessel, her master or owner, where the said vessel has utterly failed to proceed to the port of delivery, and the discretion therein contemplated cannot be invoked unless and until said vessel be at said port of delivery.

Libelant therefore excepts to the said so-called second affirmative defense, and prays that said claimant may be obliged to file a further answer to the said libel.

JOHN AMBLER,  
Proctor for Libelant.  
1519 Railroad Avenue South,  
Seattle, Washington.

Filed April 12, 1928. [20]

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[Title of Court and Cause.]

OPINION ON EXCEPTIONS TO CLAIM-  
ANT'S ANSWER.

February 6, 1928.

McNARY, District Judge.—If the facts set forth in the answer of claimant are true, it appears that the master of the vessel determined, while at Kobe, Japan, that it would be unsafe to deliver his cargo at Hongkong. The question for determination is whether Kobe can be regarded as near the port of delivery within the meaning of the bill of lading.

This is a case where the vessel entered into an agreement to deliver a cargo at a port in the

Orient at a time and place where the hazards of the undertaking were unusual. Therefore, in construing the contract, the Court should look to the language employed and the conditions that were obviously anticipated by the parties at the time the contract was made.

The port of Kobe was more than one thousand miles from the port of delivery.

If Kobe was the nearest port at which delivery of the cargo could have been made, it would, in my judgment, be near the port of delivery as intended by the parties. However, there are ports in China—Shanghai and several others—where possible delivery [21] might have been made. If the cargo could have been discharged at one of these ports, Kobe would not be near the point of delivery. In other words, it would have been the duty of the master of the ship at the time to discharge the cargo at the nearest safe port to Hongkong. Whether or not Kobe was the nearest safe port is not disclosed by the claimant's answer.

The contract contemplates that the shipper shall suffer as little inconvenience and expense as possible by reason of existing conditions.

There are no definite allegations in the answer to the effect that ports nearer Hongkong than Kobe were unsafe for the discharging of the cargo. It is merely set forth that the strike at Hongkong was widespread, and that much rioting, civil war and chaos existed in China. This allegation might be generally true, and it yet be true that the cargo might have been safely discharged at

one of the ports referred to, in which event it would have been the duty of the master of the ship to discharge the cargo at the nearest port.

The exceptions to claimant's answer will be allowed.

Filed February 6, 1928. [22]

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[Title of Court and Cause.]

OPINION ON EXCEPTIONS TO CLAIMANT'S AMENDED ANSWER.

McNARY, District Judge (Orally).—This cause of action arises out of a maritime contract, and it is the subject of admiralty jurisdiction. The bill of lading provides:

“If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged,” etc.

The amended answer sets forth that there was a general strike in all Chinese ports, including the port of Hongkong; that in each of said ports rioting, strikes and civil war existed, and that such

violence was particularly directed toward British and [23] Japanese vessels; that upon the arrival of the "Hakutatsu Maru" at the port of Kobe, Japan, the master thereof made due inquiry, and was informed of the existence of conditions at Hongkong and all other Chinese ports, and because of said information it was his judgment that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of the cargo, and as a consequence the cargo was discharged at Kobe, Japan.

The bill of lading expressly authorized the master to exercise his judgment as to the safety of landing the cargo only after the ship had arrived at Hongkong. The parties contemplated that the vessel should proceed to Hongkong and ascertain conditions before the master would be permitted to use his discretion as to the advisability of landing his cargo elsewhere.

This opinion may be inconsistent with my former holding, but, after further consideration of the bill of lading, I am convinced that it will bear no different interpretation from the one now given.

The exceptions to the amended answer will be allowed.

Filed June 4, 1928. [24]



AND AFTERWARDS, to wit, on Monday, the 4th day of June, 1928, the same being the 76th judicial day of the regular March term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [25]

[Title of Cause.]

MINUTES OF COURT—JUNE 4, 1928—ORDER ALLOWING EXCEPTIONS.

This cause was heard by the Court on the exceptions to the amended answer of the claimant herein, and was argued by Mr. John Ambler, of proctors for libelant, and Mr. Howard S. Cosgrove and Mr. Ralph H. King, of proctors for claimant. Upon consideration whereof,

IT IS ORDERED that said exceptions be and they are hereby allowed. [26]

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[Title of Court and Cause.]

DECLINATION TO PLEAD FURTHER.

To the Libelant Above Named, and to Its Proctor,  
John Ambler:

The claimant above named stands on its present pleadings, and declines to plead further.

Dated at Seattle, Wash., this 16th day of August, 1928.

COSGROVE & TERHUNE,  
Proctors for Claimant.

Filed August 25, 1928. [27]

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AND AFTERWARDS, to wit, on Tuesday, the 18th day of September, 1928, the same being the 58th judicial day of the regular July term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,  
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Appare,  
parel, etc.,

Respondent;

TATSUUMA KISEN KABUSHIKI KAISHA, a  
Corporation of the Empire of Japan,  
Claimant.

FINAL DECREE.

This case having been heard on libellant's exceptions to claimant's amended answer, and having

been fully argued and submitted to the Court, and the Court having allowed the exceptions to the amended answer and the claimant and respondent having refused to plead further,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. That the libellant recover against Tatsuuma Kisen Kabushiki Kaisha claimant herein, the sum of \$1,580.68, with interest at the rate of 6 per cent per annum from September 13, 1925, together with its costs herein to be taxed.

Done in open court this 18th day of September, 1928.

JOHN H. McNARY,  
District Judge.

O. K. as to form. Aug. 22, 1928.

COSGROVE & TERHUNE,  
Proctors for Claimant.

O. K. as to form. Aug. 23, 1928.

JOHN AMBLER,  
Proctor for Libellant.

Filed September 18, 1928. [29]

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[Title of Court and Cause.]

NOTICE OF APPEAL.

To Robert Dollar Company, a Corporation, Libellant and Appellee, and to John Ambler, Its Proctor:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the claimant and appellant

above named hereby appeals from the decision (and each and every part thereof) of the Court filed June 4, 1928, sustaining libellant's exceptions to claimant's amended answer to the amended libel; and also appeals from the final decree (and each and every part thereof) made and entered herein in favor of libellant and against the said claimant on the 18th day of September, 1928; said appeals being to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit in the City of San Francisco, California.

Dated at Seattle, Wash., this 19th day of October, 1928.

COSGROVE & TERHUNE,  
McCAMANT & THOMPSON,  
Proctors for Claimant and Appellant.

Copy of within notice received and due service of same is acknowledged this 19th day of October, 1928.

JOHN AMBLER,  
Proctor for Libellant and Appellee.  
Filed October 22, 1928. [30]

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AND AFTERWARDS, to wit, on Monday, the 22d day of October, 1928, the same being the 86th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [31]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 22, 1928—  
ORDER FIXING AMOUNT OF APPEAL  
AND SUPERSEDEAS BOND.

This cause coming regularly on before the Court, the claimant above named having appealed to the Circuit Court of Appeals for the Ninth Circuit from the decision of the Court sustaining libellant's exceptions to claimant's amended answer to the amended libel, and from the decree of the Court entered herein, and having requested the Court to fix the amount of the appeal and supersedeas bond; and it appearing to the Court that it has in its custody and control a release bond of the said claimant in the sum of \$1,580.68, and all things being considered:

The Court does hereby fix said appeal and supersedeas bond at \$1200.00.

Done in open court this 22d day of October, 1928.

R. S. BEAN,  
Judge.

Approved in the sum of \$1200.00.

JOHN AMBLER,  
Proctor for Appellee.

Filed October 22, 1928. [32]

[Title of Court and Cause.]

BOND ON APPEAL AND SUPERSEDEAS.

KNOW ALL MEN BY THESE PRESENTS, That we, Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, as principal, and Standard Accident Insurance Co., of Detroit, Michigan, a corporation of the State of Michigan, as surety, are held and firmly bound unto Robert Dollar Company, a corporation, in the sum of \$1,200.00, to be paid to the said Robert Dollar Company, its successors and assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22d day of October, 1928.

WHEREAS, the said Tatsuuma Kisen Kabushiki Kaisha, as claimant of the steamer "Hakutatsu Maru," has appealed to the Circuit Court of Appeals for the Ninth Circuit from a decision of the District Court of the United States, for the District of Oregon, filed in said District Court on June 4, 1928, sustaining libellant's exceptions to claimant's amended answer to the [33] amended libel; and also has appealed from the final decree of said District Court made and entered in favor of libellant and against the said claimant on the 18th day of September, 1928; and

WHEREAS, the said Tatsuuma Kisen Kabushiki Kaisha desires, during the progress of such appeal,

to stay the execution of the said decree of the District Court;

NOW, THEREFORE, the condition of this obligation is such that the above-named appellant, Tatsuuma Kisen Kabushiki Kaisha, shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, or on the mandate of said Court by the Court below, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated this 22d day of October, 1928.

TATSUUMA KISEN KABUSHIKI KAISHA.

By G. R. WALKER,  
Its Agent.

STANDARD ACCIDENT INSURANCE  
CO. OF DETROIT, MICHIGAN.

[Seal] By EVART LAMPING,  
Its Attorney-in-fact.

Taken and acknowledged before me this 22d day of October, 1928.

[Seal] HOWARD G. COSGROVE,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Approved this 22d day of October, 1928, as to form, amount and surety.

JOHN AMBLER,

Proctor for Libellant and Appellee.

R. S. BEAN,

Judge.

Filed October 22, 1928. [34]

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[Title of Court and Cause.]

NOTICE OF FILING BOND ON APPEAL.

To Robert Dollar Company, a Corporation, Appellee, and to John Ambler, Its Proctor:

You and each of you will please take notice that the above-named appellant has this day filed in the office of the Clerk of the above-entitled District Court, its bond on its appeal herein; said bond being executed by Standard Accident Insurance Co. of Detroit, Michigan, as surety; that said surety is a corporation duly organized under the laws of the State of Michigan, and doing business in the State of Washington, with the agent executing such bond residing and doing business at Seattle, Washington.

COSGROVE & TERHUNE,

McCAMANT & THOMPSON,

Proctors for Appellant.



Copy of within notice received and due service of same is acknowledged this 22d day of October, 1928.

JOHN AMBLER,  
Proctor for Appellee.

Filed October 22, 1928. [35]

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[Title of Court and Cause.]

### ASSIGNMENT OF ERRORS.

Comes now Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, the appellant herein, and assigns the following errors in the decision and decree to be reviewed on appeal by the Circuit Court of Appeals for the Ninth Circuit in said cause, to wit:

1. The District Court erred in sustaining the exceptions to the amended answer to the amended libel.

2. The District Court erred in making and entering its final decree in favor of libellant and against the said claimant on the 18th day of September, 1928.

Dated this 19th day of October, 1928.

Respectfully submitted,

COSGROVE & TERHUNE,  
McCAMANT & THOMPSON,

Proctors for Appellant.

Copy of within assignment of errors received and due service of same is acknowledged this 19th day of October, 1928.

JOHN AMBLER,  
Proctor for Appellee.

Filed October 22, 1928. [36]

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[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the District Court of the United States for the District of Oregon:

You will please prepare and return in behalf of the said appellant, in accordance with the statutes and rules of said Circuit Court of Appeals for the Ninth Circuit, apostles on appeal herein, including:

1. Libel.
2. Release bond.
3. Claim.
4. Stipulation extending time for pleading, etc.
5. Amended libel.
6. Claimant's amended answer.
7. Exceptions to claimant's amended answer.
8. Decision sustaining exceptions to claimant's answer.
9. Decision sustaining exceptions to claimant's amended answer.
10. Declination to plead further.
11. Final decree.
12. Notice of appeal.

13. Order fixing amount of appeal and supersedeas bond.
14. Bond on appeal.
15. Notice of filing bond on appeal.
16. Assignment of errors.
17. This praecipe.
18. A caption pursuant to subdivision i of Admiralty Rule 4 of said Circuit Court.

COSGROVE & TERHUNE,  
McCAMANT & THOMPSON,

Proctors for Appellant.

Filed October 22, 1928. [37]

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CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO APOSTLES ON APPEAL.

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from one to thirty-seven, inclusive, constitute the apostles on appeal from a final decree in said court in a case in which Tatsumma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, claimant of the SS. "Hakutatsu Maru," her engines, apparel, etc., is appellant and Robert Dollar Company, a corporation, is libellant and appellee; that the said apostles have been prepared by me in accordance with the rules of court and the praecipe filed by the appellant and contain a full, true and

complete transcript of the record and proceedings had in said court in said cause which the said rule and the said praecipe direct shall be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing apostles is \$5.60, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 25th day of October, 1928.

[Seal]

G. H. MARSH,  
Clerk. [38]

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[Endorsed]: No. 5633. United States Circuit Court of Appeals for the Ninth Circuit. Tatsuuma Kisen Kabushiki Kaisha, a Corporation of the Empire of Japan, Claimant of the Steamship "Hakutatsu Maru," Her Engines, Apparel, etc., Appellant, vs. Robert Dollar Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed November 19, 1928.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.